



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 535

Case No. 601: SHATILOVA

Against: The Secretary General of
the International Civil
Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First
Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 3 June 1991, Lioudmila Nikolaevna Shatilova, a staff
member of the International Civil Aviation Organization, hereinafter
referred to as ICAO, filed an application containing the following pleas:

"II. Pleas:

1. As a preliminary measure the Applicant requests the President of the UNAT [United Nations Administrative Tribunal] to request the Respondent to continue the employment of the Applicant until such time that the Tribunal has ruled on the case;
2. The Applicant seeks to obtain a renewal of her contract as G-8 Editorial Assistant at the International Civil Aviation Organization. She submits that the Respondent should have maintained her in service in accordance with article 59 of the Chicago Convention, the ICAO Staff Regulations and Rules, the relevant general principles of International Law as reflected in the Charter of the United Nations as well as her own record of her satisfactory employment with the Organization.

...

The Tribunal is also requested to:

1. Order the Respondent to provide the Applicant with a contract of employment following standard ICAO procedures;
2. Order payment to the Applicant of salary lost during the period of unemployment between the expiry of her contract and the reconstitution of employment;
3. In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of two years net base salary."

Whereas the Applicant filed an addendum to her application on 20 June 1991;

Whereas the Respondent filed his answer on 3 July 1991;

Whereas, on 28 August 1991, the Applicant filed written observations in which she requested the Tribunal:

"to decide in the affirmative and to order her reappointment as Editorial Assistant G-8 retroactively from 12 June 1991 together with compensation for actual costs incurred as a result of the termination of the appointment.

Alternatively, Applicant requests that the Tribunal order the case to be referred to the Secretary General of ICAO in accordance with the recommendation of C/LPB [Chief/Language and Publications Branch] and with normal ICAO procedures.

In the event of compensation being paid in lieu of reappointment, the Applicant requests the granting of award in the amount of two years net base salary."

Whereas, on 11 and 13 September 1991 respectively, the Respondent and the Applicant submitted additional information at the request of the Tribunal;

Whereas the Respondent submitted additional documents on 3 October 1991 at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, a national of the USSR, entered the service of ICAO on 12 June 1989 under a fixed-term appointment for two years at the G-8 level as an Editorial Assistant in the Russian Section, Language and Publications

Branch, Bureau of Administration and Services. Her candidature for that post had been presented to ICAO on 4 January 1988 by the Representative of the USSR on the Council of ICAO. With effect from 28 November 1989 the Applicant's post was transferred, and the Applicant reassigned, to the newly created Russian Editorial Unit, within the Russian Section.

On 14 December 1990 the Applicant, whose contract was due to expire on 11 June 1991, requested in a memorandum to the Chief of the Personnel Branch that her contract be renewed for a further period. On 17 December 1990 her request was "fully supported" by the Chief of the Language and Publications Branch on the ground that, according to the Chief of the Russian Section, her performance had been "satisfactory throughout".

On 14 January 1991, in a memorandum addressed to the Secretary General of ICAO "to present ... the position of the USSR Administration concerning further implementation of the principle of rotation of the Soviet staff in the Russian Section of the ICAO Secretariat", the Representative of the USSR on the Council of ICAO stated:

"The USSR Administration has continuously been taking steps to submit in a timely manner qualified candidates with adequate experience to fill vacancies in the Russian Section. In respect of appointments for USSR citizens in ICAO the USSR Administration follows the principle of secondment or Government release which is given for a certain period of time and ensures rotation of Soviet specialists."

He noted that in 1991 the "Government release" would expire in respect of eight staff members of the Russian Section - including the Applicant -, who would return home upon termination of their contracts, and he announced that the qualified candidates to replace those staff members had been selected. On 16 January 1991 the Representative of the USSR submitted to the Secretary General the candidacy of a certain Ms. V.A. Kozlovskaya for "the post of Editorial Assistant in the Russian Section to be vacant in June 1991." On 9 April 1991 the Secretary General sought from the Representative of the USSR additional information on "the secondment status of the Soviet staff in light of United Nations Tribunal Judgements Nos. 92, 192, 333 and 482 in which the criteria for recognizing the secondment status of staff have been established." On 11 April 1991 the Representative of the USSR replied in part:

"...

We once again affirm that in the execution of its personnel policies for the selection, training and assignment of Soviet specialists to work within the ICAO Secretariat, the Administration of the USSR fully implements the principles of secondment, which provide for tripartite cooperation in defining reciprocal rights and obligations.

...

All persons who receive the consent of the Soviet Administration to their working in the ICAO Secretariat (Russian Section) are advised orally by a representative of the Administration of the termination date indicated on their contracts.

Thus the principle of tripartite cooperation is implemented on the basis of the provisions of the Chicago Convention and in compliance with the terms of the oral understanding between the ICAO Administration and the Administration of the USSR, taking into account the specific characteristics of the staffing of the Russian Section, including recruitment and training of personnel.

...

The written tripartite understanding concerning the term of service agreed upon is stipulated in the contract which is signed by the Secretary General of ICAO and the professional or general service staff member, and is confirmed by the written consent of the Representation of the USSR on the basis of a decision by the Soviet Administration.

..."

On 8 May 1991 the Applicant reiterated her request for a contract renewal in a memorandum addressed to the Secretary General; she added:

"I would like herewith to confirm that I am not presently employed in the service of the Government of the Soviet Union; nor have I ever concluded any secondment agreement with the USSR Government and/or ICAO for that matter."

On 10 May 1991 the Secretary General informed the Applicant that he was unable to comply with her request; he drew her attention to the clause in her letter of appointment stating that the appointment carries no expectancy of renewal upon expiry.

On 13 May 1991 the Applicant requested the Secretary General to review his decision not to extend her contract or, if that was impossible, to suspend the decision under staff regulation 11.4 until the recourse procedure had been exhausted and a final judgement of the Tribunal rendered in the case. On 21 May 1991 the Secretary General rejected both requests of the Applicant but agreed to direct submission of her application to the Tribunal should she wish to appeal against his decisions. On 3 June 1991 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The refusal by the Respondent to renew the Applicant's contract was illegal because the Applicant was not given any consideration or explanation.

2. The Applicant was not given the true reason for the denial of further employment, which is a confidential and unwritten agreement between ICAO and the USSR Government concerning the recruitment of staff in the Language and Publications Branch.

3. The Respondent's decision was arbitrary, based on considerations contrary to and in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules and general principles of international law, and constituted an abuse of power.

4. Non-observance by the Respondent of his obligations under the Chicago Convention, the ICAO Staff Regulations and Rules and the relevant principles of international law constituted discriminatory treatment of the Applicant as compared to other, non-USSR, ICAO staff members.

5. In the absence of a secondment agreed to by all parties in conformity with the principles reaffirmed in Judgement No. 482, the Respondent cannot legally rely on decisions by a government to justify his own action with regard to the employment of the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant accepted the appointment offered to her by ICAO together with all the terms and conditions therein. The appointment carried no expectancy of renewal upon expiry. A letter of appointment is a contract binding upon both parties, the Organization and the staff member, and the

Applicant was fully aware from the time she accepted it that her appointment would terminate on its expiry date without further notice. Therefore, the decision of the Respondent not to renew her contract was not arbitrary and was not in conflict with the Chicago Convention, the ICAO Staff Regulations and Rules or general principles of international law; not did the decision constitute an abuse of power.

2. In taking the contested decision, the Respondent gave careful consideration to all relevant factors, including the secondment aspects; he did not depart from the established practice which has been followed over the years with respect to Soviet staff members in the General Service category.

3. The Applicant disputes the existence of any formal secondment agreement between her, ICAO and the USSR Government, without offering any evidence that she is not on secondment from her national Administration.

The Tribunal, having deliberated from 21 to 29 October 1991, now pronounces the following judgement:

I. The Applicant, a national of the USSR, entered the service of ICAO on 12 June 1989 with a two-year fixed-term contract. On 14 December 1990 the Applicant requested that her contract be renewed. The request was not granted. The final decision refusing to renew the contract was taken by the Respondent on 21 May 1991. This is the contested decision.

II. The Respondent does not contest the Applicant's qualifications. Moreover, the Chief of the Language and Publications Branch backed up the request of the Applicant, whose performance, according to the Chief of the Russian Section, had been "satisfactory throughout".

III. The Respondent bases his decision mainly on legal grounds. According to resolution A14/6 of the ICAO Assembly, "in cases where it is desired to recruit a person from the Government Service of a Contracting State, the Secretary General shall take all practical steps to obtain the consent and co-operation of that State". Pursuant to that provision, the Secretary General requested the consent of the USSR Government to the renewal of the

Applicant's contract. He did not obtain that consent. The Secretary General considered that he was therefore not able to renew the contract.

IV. The Tribunal considers that the provision invoked by the Respondent applies both to the recruitment of ICAO personnel and to the renewal of their contracts.

V. However, according to the actual wording of paragraph 3 of resolution A14/6 of the ICAO Assembly, the person concerned must be "from the Government Service of a Contracting State".

The Applicant contends that when she entered the service of the Organization she ceased to belong to a governmental organization or a public institution or enterprise of the USSR. She indicates that on the date when she requested the renewal of her contract she was not in the government service of the USSR. At no time did the Representative of the USSR to ICAO inform the latter of any arrangements made to find the Applicant a post or to reinstate her in her former post when she returned home at the end of her contract.

The Respondent was therefore not able to determine that the Applicant was indeed in the government service of the USSR when she requested a new contract.

VI. In view of all the information in the file, the Tribunal considers that at the time when the Applicant requested the renewal of her contract she was not in the "Government Service of a Contracting State" in the sense of paragraph 3 of resolution A14/6 of the ICAO Assembly. The Respondent was therefore not obliged to request the consent of the USSR Government in order to proceed with the renewal of the contract. By requesting such consent and basing his decision on the USSR Government's refusal to give its approval, the Respondent committed an error of law.

VII. The Tribunal considers that this error of law vitiates the decision taken. However, the Tribunal in no way questions the good faith of the Respondent, who was faced with a complex and confusing situation. In this

instance, the Respondent was required under article 59 of the Chicago Convention to determine independently, in the interest of the Organization, whether the Applicant's contract should be renewed.

VIII. There is no doubt that the Applicant's status was not the same as that of personnel seconded by their Governments. The Tribunal has defined in its jurisprudence the conditions for such secondment and they have not been satisfied in this instance.

IX. Article 58 of the Chicago Convention states that the ICAO Assembly may determine the status of the personnel by its rules. It further states that the Council of the Organization shall determine, subject to those rules and to the provisions of the Convention, the method of appointment and of termination of appointment, the training, and the salaries and conditions of service of the personnel. Article 59 of the Chicago Convention stresses the international character of the responsibilities of the personnel. The Tribunal emphasizes that it does not wish to weaken those provisions by this judgement.

X. Similarly, the application of paragraph 3 of resolution A14/6 is not affected by this judgement, provided that the candidate for recruitment to the international civil service is in the government service of a Contracting State and has not left the service of his Government.

XI. The Tribunal considers that the error committed by the Respondent entails his responsibility and entitles the Applicant to compensation.

XII. For the foregoing reasons, the Tribunal:

1. Decides that the Secretary General of ICAO shall pay the Applicant, as compensation, her salary and related allowances from the date when her service ended until 31 December 1991 or until the date on which the Secretary General takes the decision referred to in paragraph 2 below, if this decision is taken before 31 December 1991.

2. Invites the Secretary General to re-examine the Applicant's request for renewal of her contract, to inform the Applicant of his decision before 31 December 1991, and also to inform the Tribunal of that decision.

3. Rejects all the other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 29 October 1991

Jean HARDY
Acting Executive Secretary